
Jones, Russotto & Walker, B-283288.2, December 17, 1999



Decision

Matter of: Jones, Russotto & Walker A8U09510

File: B-283288.2

Date: December 17, 1999

Robert G. Jones, Esq., for the protester.

Richard A. Marchese, Esq., Department of Housing & Urban Development, for the agency.

Jacqueline Maeder, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging contracting agency's decision to conduct competitive procurement rather than exercising incumbent contractor's option is not for consideration because the decision whether to exercise an option is a matter of contract administration.
2. Protest by an incumbent contractor that solicitation does not present adequate information to permit bidders to compete is denied where the solicitation provides sufficiently detailed information on the agency's requirements to enable bidders to intelligently prepare a bid on relatively equal terms.
3. Protest that solicitation estimates for the number of anticipated real estate closings are inaccurate is denied where the estimates are based on rationally adjusted historical data and the record does not establish that the estimates are unreasonable or not based on the best information reasonably available to the agency.

DECISION

Jones, Russotto & Walker (Jones) protests the terms of invitation for bids (IFB) No. B-PHI-00419, issued by the Department of Housing and Urban Development (HUD) for real estate closing services in connection with the sale of single-family properties owned by HUD within Virginia. [1] Jones, an incumbent contractor, has raised a variety of objections to the IFB. The crux of Jones's protest is that the new solicitation allegedly reflects the agency's improper determination not to exercise the remaining options under the predecessor contract. Jones's objections to the current IFB largely reflect its view that HUD's failure to exercise the option under Jones's contract is designed to "terminate prematurely without cause" the closing services that Jones is performing under a contract that it was "led by HUD to believe . . . would be renewed annually through October 31, 2001." Protest at 1. Jones takes the position that the terms of the extant contract should remain unchanged, and alleges that the solicitation is defective because the information provided in the IFB is not adequate to permit competition on an equal basis, the agency unreasonably divided the state into six geographic service areas, and the estimates of the total number of

expected closings and the expected closings in each area are so unrealistic as to prohibit the submission of meaningful bids.

We deny the protest.

The IFB, issued on June 30, 1999, as a small business set-aside, provides for the award of up to six fixed-price, indefinite-quantity contracts, one for each of six geographic service areas, for a base year with two 1-year options. IFB amend. 5, § B-8. Each successful bidder is to close, within its geographic service area, any sales transaction assigned to it by HUD's management and marketing (M&M) contractor. ^[2] The six geographic service areas initially outlined in the original IFB at section B-1 were identical to those specified under the current contracts. These geographic areas were redefined in amendment 3 at section B-1. The solicitation maintained the same number of geographic areas, and the redefined areas were not named, but simply numbered with the IFB listing the counties and the independent cities included in each area. Amendment 3 also included a map of Virginia, which showed each county and outlined and numbered each of the six redefined areas. The prices paid per closing under current contracts for the geographic service areas delineated under the prior solicitation were also provided in the solicitation. IFB amend. 3, Cover Page. The amendment stated that the six areas under the current contracts do not correspond to the redefined areas under this IFB. Id.

At section C, the IFB contained a 10-page statement of work (SOW) which outlined the work to be performed and the time frames. The SOW required contractors to provide the necessary services, personnel, equipment and material to, among other things, establish and maintain case files, conduct for each property a "lien and judgment" full title search covering the preceding 10 years, and obtain and maintain files of homeowner association and condominium documents. IFB amend. 3, § C-3. The SOW required contractors to conduct all closings in person with the purchaser or the purchaser's representative, id. § C-2(b), to ensure accurate payment of all closing costs within 3 to 5 business days of the closing, id. § C-2(c)(2), and to deliver a complete closing package to HUD within 2 business days of closing. Id. § C-2(c)(4). The solicitation also required the HUD contractor to be physically present at all closings being conducted by a third party and provided that the contractor would receive only 50 percent of its fixed unit price for third-party closings. ^[3] IFB amend. 5, § B-8(b). Finally, the SOW specified the contractor's responsibilities at each closing and after each closing, including, for example, explaining all documents to the purchaser, executing all documents, depositing and verifying sales proceeds, filing the deed, and maintaining complete records of each closing. IFB amend. 3, §§ C-3(c)(11), (12). The contractor was also to provide a weekly report of all cases assigned to the contractor. The SOW provided specific information that was to be included in the weekly report. Id. § C-3(c)(16).

The IFB pricing schedule provided an estimated number of closings for each area for the base year and for each option year. IFB amend. 5, § B-8. The IFB specified that HUD would order a minimum of 10 percent and a maximum of not more than 150 percent of the annual estimated quantities. Id. § B-3. Bidders were to provide, for each geographic service area on which they submitted a bid, a unit price per closing and an extended price, based on the estimates provided for evaluation purposes, for the base and each option year. Bidders were also to submit a total price. Id. § B-8.

The agency received nine bids by the September 28 bid opening. Agency Report at 3. Prior to bid opening, Jones filed a protest with our Office objecting to the terms of the solicitation. ^[4] The agency has extended performance under the existing contracts to January 31, 2000, and has not awarded contracts under the solicitation, pending the resolution of the protest. Id.

FAILURE TO EXERCISE OPTIONS

While Jones styles its protest as a protest against defective specifications, Jones principally challenges the agency's determination to issue a new solicitation rather than exercise the options under the existing contracts. Jones argues that HUD's decision to issue a new solicitation constituted a premature termination of Jones's existing contract which was arbitrary, capricious and without justification. Protest at 3. The protester contends that HUD's failure to exercise the options shows bad faith on the part of the agency, and that HUD should set the new solicitation aside until the agency can prepare a sound replacement. Protester's Comments at 19.

The Federal Acquisition Regulation (FAR) defines an option as a "unilateral right" of the government to elect to purchase additional supplies or services or to extend the term of a contract, and makes clear that a contracting agency is under no requirement to exercise an option. FAR §§ 17.201, 17.207. Our Office will not consider an incumbent contractor's protest of an agency's refusal to exercise an option under an existing contract since this decision is a matter of contract administration outside the scope of our bid protest function. American Consulting Servs., Inc., B-276149.2, B-276537.2, July 31, 1997, 97-2 CPD ¶ 37 at 9. We will not consider the matter even where, as here, the protester alleges that the agency's decision to not exercise an option in its contract was made in bad faith. [⁵] Walmac, Inc., B-244741, Oct. 22, 1991, 91-2 CPD ¶ 358 at 2.

ADEQUACY OF THE INFORMATION PROVIDED IN THE SOLICITATION

Jones next argues that the solicitation does not allow all bidders to compete on a fair and equal basis because firms that have not performed this contract in the past will be unaware of the great increase in the amount of work required here and, therefore, the current contract prices noted in the solicitation are misleading and will result in unrealistically low bids from unknowledgeable bidders. Protest at 4. The protester lists 22 additional tasks, including, for example, the requirement that the closing agent obtain home owners association and condominium documents, personally attend third party closings, and perform a 10 year "lien and judgment" title examination, which were not required under the prior solicitation. Id. at 5-6. Jones argues that HUD has a duty to explain the changed requirements to all bidders and disclose that the prices quoted in the solicitation do not include all the tasks required under this solicitation. Id. at 6.

As a general rule, a procuring agency must give sufficient detail in a solicitation to enable bidders to compete intelligently and on a relatively equal basis. Service Technicians, Inc., B-249329.2, Nov. 12, 1992, 92-2 CPD ¶ 342 at 2. Specifications must be free from ambiguity and describe the minimum needs of the procuring activity accurately. Hero, Inc., B-213225, Dec. 14, 1983, 83-2 CPD ¶ 687 at 3. There is no legal requirement, however, that a competition be based on specifications drafted in such detail as to eliminate completely any risk for the contractor or that the procuring agency remove all uncertainty from the mind of every prospective bidder. Analytics Inc., B-215092, Dec. 31, 1984, 85-1 CPD ¶ 3 at 4-5. Here, the IFB provides sufficiently detailed information to allow bidders to compete intelligently and on a relatively equal basis.

The IFB provided every prospective bidder with detailed descriptions of each task to be performed under the contract. As noted above, these tasks included services such as obtaining condominium documents, attending third party closings, explaining closing documents to purchasers, preparing weekly reports, and maintaining a complete record of each closing. IFB amend. 3, § C-3. Moreover, in many instances, the IFB outlined exactly what the agency required under each of the tasks. For example, for third-party closings, the SOW listed eight tasks the contractor was expected to perform, including, for example, forwarding a letter to the third party closing attorney outlining HUD's requirements and time frames, preparing a deed and forwarding the deed for signature, depositing sale funds into HUD's escrow account and arranging a wire transfer of the funds to HUD's Treasury account, ensuring proper deed recordation, and forwarding the closing package to the M&M contractor. Id. § C-3(c)(10). Similarly, the SOW listed eight

responsibilities the contractor was expected to perform at closing and four responsibilities the contractor was expected to perform after closing. Id. §§ C-3(c)(11), (12). Moreover, as noted above, other bidders submitted bids without protest. In our view, this detailed information regarding HUD's current requirements contained in the IFB was adequate to permit prospective bidders to apply their own cost data to the requirements described by the IFB and calculate a bid price with which they could compete intelligently and on an equal basis with all other bidders. While the historical prices per closing provided in the IFB may not reflect the cost of performance of the present scope of work under the IFB, this should not materially influence the preparation of bids since the current stated requirements should guide bidders in preparing their bids rather than the historical cost figures. International Resources Corp., B-248050.3, Feb. 16, 1993, 93-1 CPD ¶ 138 at 3.

OTHER CHALLENGES

Jones next challenges the redefined geographic areas, the estimate for the total number of closings and the estimates for the closings in each of the six individual areas, arguing that the redefined areas and unrealistic estimates prohibit bidders from preparing informed bids and thus inhibit competition. Protester's Comments at 11.

Redefined Geographic Areas

Jones argues that the redefined areas are generally larger than the areas they replace, resulting in unmanageable distances to be covered by closing agents, and that the agency has redefined the state so that the majority of anticipated closings will occur in two areas. Id. at 6. The agency states that it considered many factors in dividing the state into service areas, including, for example, input from current contractors, and determined to divide the state so as to try to increase competition. Agency Report at 8. Specifically, amendment 3 significantly reduced the size of what had been the two largest areas, making the redefined areas more uniform in size. The agency believes the reduced size of the larger areas will likely increase competition because more prospective bidders will be capable of handling a smaller geographic area. Id. Additionally, the contracting officer states that the agency wanted to decrease travel distances for buyers, especially first-time buyers in urban areas, so the agency tried to make the closing agents' offices more convenient to buyers. Supplemental (Supp.) Agency Report, Contracting Officer's Supp. Statement (COSS), Nov. 9, 1999, at 6. While HUD also tried to decrease the distance its closing agents may have to travel to third-party closings, the contracting officer states that the agency determined to put the greater travel burden on the agent rather than on the buyer because the agent could build travel expenses into its bid. Id. at 7.

Nothing in the record supports the protester's contention that the redefined geographic areas are improper. A comparison of two maps prepared by the protester shows striking differences between the redefined areas and the original areas. Under the original boundaries, two areas cover approximately two-thirds of the state. In contrast, the redefined areas are relatively equal in geographic size, with the two areas under the original boundaries which covered approximately two-thirds of the state significantly reduced in size. Because no one area is significantly larger than the others, and all appear relatively manageable in terms of travel, it is reasonable to expect, as the agency hypothesized, that more prospective bidders will be capable of handling the more uniform areas. Moreover, while Jones complains about the divisions, the protester offers no alternative, other than maintaining the original six areas which, as clearly illustrated by the protester's own map, are not at all equal in size and, for the areas covering two-thirds of the state, would require burdensome travel by buyers and by closing agents. As to Jones's contention that the majority of closings will occur in only two areas, we note that any state has more populated urban centers and less populated rural areas. Given the size of the state and the various locations of the major cities, it is not feasible to evenly allocate major urban areas across all six redefined geographical areas. Accordingly, the

record provides no reason to object to the redefinition.

Estimates

Jones argues that the estimate for the total number of closings is unreliable, pointing out that the number of closings handled by the M&M contractor is significantly less than the agency's estimate. Specifically, Jones states that HUD's own published records indicate that under the M&M contract which included Virginia and which was terminated for default in September, only 2,261 homes were sold in 21 states and the District of Columbia in 6 months. Supp. Protest at 2. Based on these figures, Jones argues that HUD's estimated total of 3,620 closings for Virginia in one year is "wildly incorrect." Id. The protester also argues that the agency's use of inventory figures as a "check" on its estimate is unreliable because the anticipated number of closings using this formula varies from 2,088 to 12,570. Protester's Comments at 3. In addition, Jones challenges the estimates for each of the six individual geographic areas, noting, for example, that only 1 percent of the population of the state lives in the major urban region of area 3 yet the agency estimates 1,200 closings for area 3, the largest estimate for any area. Id. at 8-9. Because HUD has no historical numbers for the redefined areas, Jones argues that the agency should base its area estimates on county-by-county and city-by-city data. Id. at 3. Finally, Jones argues that the agency should include an estimate for the anticipated number of third-party closings.

Id. at 4.

HUD takes the position that it used the best information available to establish both the total estimate and the estimates for each individual area. The agency reports that, in developing the total estimate for the number of closings, while it considered a number of variables, including the experience and expertise of the HUD staff, the agency relied primarily on the historical number of closings in the state and on inventory numbers. Supp. Agency Report, COSS, Nov. 9, 1999, at 3. Specifically, according to HUD, its computerized Single Family Asset Management Systems (SAMS) shows that between March 1998 and March 1999, HUD closed on 3,269 single-family properties in Virginia. [⁶] Id. Additionally, HUD staff used its inventory as a "check" on the accuracy of the estimated quantity of closings. Supp. Agency Report, Nov. 19, 1999, at 2. The agency has determined from practice and experience that generally it is realistic to expect that its inventory at any given time will turn over twice in a given 12-month period. Id. Here, the January 1999, inventory for Virginia was 1,647 single-family properties, on the basis of which the agency expected to close on 3,294 single-family properties (1,647 times 2) over the next 12 months. Supp. Agency Report, COSS, Nov. 9, 1999, at 15. Similarly, the February 1999 inventory was 1,689, on the basis of which the agency expected to close on 3,378 single-family properties over the next year. Id. at 16. While HUD concedes that this formula is "necessarily simplistic" and "far from an exact science," it is based on actual agency experience. Supp. Agency Report, Nov. 19, 1999, at 2.

As to the estimates for each of the six individual geographic areas, the agency states that it relied, again, on the experience and expertise of its staff, and assigned larger estimates to those areas with historically larger inventories and smaller estimates to those areas with historically smaller inventories. Supp. Agency Report, COSS, Nov. 9, 1999, at 4. Because the six geographic areas were redefined, the agency had no directly applicable historical data to use to make its determination. In response to the protester's argument that the agency should have determined its estimates based on county-by-county and city-by-city calculations, the agency explains that such an analysis would require a line-by-line review of hundreds of computer print-out pages and that its personnel would have to manually categorize each closing by city and county. Supp. Agency Report, Nov. 19, 1999 at 3. The agency points out that this enormously time-consuming process would have served little purpose in view of the inexact nature of estimating the anticipated closings over the next year and the myriad number of factors that impact this estimate, including, for example, the national and local economy, employment rates, the performance of the M&M

contractor, and the personal preferences of buyers. Id.

When an agency solicits bids on the basis of estimated quantities to be ordered over a given period, as here, those quantities must be compiled from the best information reasonably available and must present a reasonably accurate representation of the agency's anticipated needs; however, there is no requirement that they be absolutely correct. Custom Envtl. Serv., Inc., B-241052, Jan. 15, 1991, 91-1 CPD ¶ 38 at 3.

Nothing in the record supports the protester's contention that any of the estimates are defective or not based on the best reasonably available information.

Specifically, we find reasonable both the agency's use of the adjusted historical number of closings for the prior year and the "check" the agency performed using inventory figures as a basis to establish the total closings estimate. As noted above, the total number of closings for Virginia for the prior year was 3,457, the inventory "check" using January and February 1999 figures indicated that HUD could expect to close 3,294 or 3,378 single-family properties, and the estimate given in the IFB for total closings was 3,620. The estimate, therefore, is only slightly higher than the historical number of closings and the anticipated number of closings based on current inventory. As noted above, the IFB guarantees as a minimum 10 percent of the estimated number of closings and as a maximum 150 percent of the estimated number of closings. Given the estimates and the guaranteed minimum and maximum, we believe that the solicitation provides bidders sufficient information to intelligently prepare their bids. The protester's concern that the estimate for the total number of closings in a year is unreliable because it varies significantly from the actual number of closings completed by the M&M contractor covering Virginia is misplaced because these numbers reflect transition and performance anomalies associated with a particular M&M contractor. However, as noted above, the initial M&M contract has been terminated and a new M&M contractor has begun performing those duties. The agency states that it anticipates that the new M&M contractor will greatly increase sales of single-family properties over the next few years. As to the range of closings that Jones calculates using HUD's inventory "check" formula, the higher figures are the result of inventory build-ups in Virginia after March 1999 when HUD transitioned to the M&M contracts, coupled with the inability of the prior M&M contractor covering Virginia to satisfactorily perform the work.

As for the estimates for the six individual areas, especially area 3 which Jones argues is high based on the population of the urban area in that region, the agency notes that its estimate for area 3 is 33 percent of the total and that while it has no data for any of the newly created areas, HUD assigned relatively larger estimated quantities of closings to those areas which had historically shown larger inventories and thus more expected closings. Moreover, as noted above, the guarantees provided in the solicitation provide a reasonable range of the number of anticipated closings and sufficient information for bidders to use to determine their bids. While Jones disagrees with this determination, we have no basis to object to the agency's conclusions.

With respect to third-party closings, the agency states that it did not include an estimate for this type of closing in the solicitation because it does not maintain accurate records of third-party closings in its automated system. Supp. Agency Report, COSS, Nov. 9, 1999, at 4. Moreover, the agency states that any estimate of third-party closings is extremely speculative since this factor is affected not only by the economy and employment figures, but also by the choices made by the buyers of HUD properties. Agency Report at 6. Indeed, the agency states that the number of third-party closings could even be affected by the relationship between HUD's closing agent and real estate agents and the reputation of the HUD agent because real estate agents may steer buyers away from closing agents with whom they have a poor relationship or who have poor reputations. Id.

We do not object to the agency's decision not to provide an estimate of third-party closings, since no

records are maintained regarding these closings. Although Jones argues that this information should be disclosed, the protester never specifically identifies, other than complaining about the price differential between regular and third-party closings, why this subfactor of the total number of closings is so critical. Because Jones is an incumbent with some knowledge of the number of third-party closings from previous years, it is in a better position to estimate the number of third-party closings than other bidders. Thus, we fail to see how Jones is harmed by the agency's failure to disclose in the IFB this estimate for a subfactor of the total number of closings. [7]

In sum, Jones's arguments are without merit and, in fact, they appear to simply reflect the protester's dissatisfaction with HUD's transition to M&M contractors and, in particular with the agency's resulting determination not to obtain performance through the exercise of options under the prior contracts, a determination which, as explained above, is not for our review. Accordingly, the protest is denied.

Comptroller General
of the United States

Notes

1. HUD insures single-family mortgages under a number of programs. Where mortgagors default on their HUD-insured loans, HUD reimburses the lender the balance due on the loan, secures possession of the property and resells the property. Single-family properties are defined to include properties of one to four units. IFB amend. 3, § C-2(a).

2. In February 1999, HUD significantly revised its disposition process by awarding multiple M&M contracts under which various contractors would perform many of the functions previously handled by HUD staff in maintaining and selling homes owned by the agency as a result of foreclosures. Agency Report at 1. On September 22, HUD terminated for default the M&M contractor covering Virginia. A new M&M contractor began performing the required duties on September 29. Agency Report at 1 n.2.

3. Third-party closings are closings where the buyer elects to use someone other than HUD's contractor as the closing agent.

4. As a preliminary matter, the agency argues that the protest should be dismissed because Jones did not submit a bid and therefore is not an interested party eligible to protest under our Bid Protest Regulations. We find no merit in HUD's argument. A protester is an interested party to allege that an IFB is restrictive or otherwise defective where the firm would have an opportunity to bid if the procurement is solicited without the defective specifications. *Remtech, Inc.*, B-240402.5, Jan. 4, 1991, 91-1 CPD ¶ 35 at 3.

5. We note that Jones has provided no evidence, and there is no evidence in the record, to support its assertion of bad faith. On the contrary, the record shows that the agency has significantly altered the way it processes its closings of single-family housing and modified its work requirements, and this was the basis of its determination to resolicit under a revised IFB.

6. The 3,269 figure was reported in the agency's first supplemental report and includes 2,469 closings in the Richmond area, which, until March, 1999, encompassed all of Virginia except for the Northern Virginia area, which was included in HUD's Washington, D.C. office. In the Northern Virginia area, HUD closed on approximately 800 single-family units. Together, the closings total 3,269. Supp. Agency Report, COSS, Nov. 9, 1999, at 3. Subsequently, in a second supplemental report, the contracting officer corrected these figures and reported that its SAMS closed case report for the year indicated that there were 2,493 (rather than 2,469) single-family closings in Virginia and 964 (rather than 800) single family closings in

Northern Virginia, totaling 3,457 closings for the year. Supp. Agency Report, Nov. 19, 1999, at 1-2.

7. Jones also makes numerous allegations of unreasonable or unworkable requirements, and argues that many of the tasks added under the solicitation are burdensome. For example, Jones argues that additional information that is to be submitted in the weekly reports is burdensome, that requirements concerning third-party closings are defective in various respects, and that the 10-year lien and judgment search requirement is unworkable. While we will not discuss these allegations in the decision, we have reviewed all of the specifications at issue and the agency's explanation for the requirements and find that the agency has demonstrated reasonable bases for the challenged requirements.